Supreme Court of the United States

OCTOBER TERM 1912

No. 300

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company,

Petitioners,

against

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

BRIEF FOR RESPONDENT

WILLIAM PAUL ALLEN,
Counsel for Respondent.

BENJAMIN DIAMOND,
of Counsel.

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I

Opinions of the Courts Below

The District Court delivered no opinion.

The majority and minority opinions of the Circuit Court of Appeals for the Second Circuit are reported in 129 F. (2d) 976, and will be found on pages 441-489.

II

Statement of the Case

In its opinion the Circuit Court of Appeals summarized the facts and pleadings as follows (R. 441, 442):

"Appellants, as trustees in reorganization of the New York, New Haven and Hartford Railroad Company, appeal from a judgment, entered upon a jury verdict, awarding $25,077.35 to the plaintiff in his individual capacity and $9,000.00 to him as administrator of his wife's estate. The action grew out of an accident which occurred at a grade crossing of the appellant railroad in West Stockbridge, Mass. On December 25, 1940, at about 6:15 P. M., the plaintiff was driving a Ford Coupe, with his wife as a passenger, at this crossing, when the car was struck by a locomotive engine, causing severe and permanent injuries to the plaintiff and the death of his wife. The complaint alleged that the railroad was negligent in failing to ring a bell or blow a whistle while approaching the crossing, and in failing to have a proper headlight; in view of the verdict, no issue is raised as to appellants' liability if the rulings on evidence and the charge to the jury were proper, and the alleged errors pertain exclusively to these matters."

The plaintiff in the first cause of action seeks damages for personal injuries to himself, under the General Laws of Massachusetts, Chapter 160, Sections 138 and 140, and Chapter 231, Section 85 (R. 3-7; Appendix, pp. 35-36), and in the second cause of action seeks damages under the common law (R. 7-9). The plaintiff, as administrator, in the third cause of action seeks damages for the death of his wife, under the same statutes and Chapter 229, Section 3 (R. 9-11; Appendix, p. 36), and in the fourth cause of action seeks damages for her death under the common law (R. 11). The allegations as to the statutes are admitted in the answer (R. 15, 18).

As a third separate answer and defense the defendants allege Chapter 160, Section 232 of the Massachusetts Laws (R. 23; Appendix, p. 35).

The issues as to negligence submitted by the court to the jury were whether a bell was rung, whether a whistle was blown, and whether a light was burning on the front of the train (R. 383, 385, 386).

At the trial a statement of petitioners' engineer, who had died subsequent to the accident (R. 239), was offered in evidence under 28 U. S. C. A., Section 695 (Act of June 20, 1936, Chap. 640, Sec. 1, 49 Stat. 1561; Petitioners' Exhibit J for Identification, R. 431-435). Respondent's objection to its introduction in evidence was sustained by the trial court (R. 381, 382). The Circuit Court of Appeals sustained this ruling (R. 461, 469) and error is claimed.

This statement was offered in evidence in the following language (R. 381):

> "Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.
>
> "The statement was signed by the engineer, and is marked for identification as Exhibit J under Section 695 U. S. C. A. 28.
>
> "The defendants offer the proof also that this statement was signed in the regular course of any (sic) business and that it was the regular course of such business to make such statement."

No claim was made by the petitioners that it was a report of a public official or was admissible as part of such report and no such claim was made in the petitioners' brief before the Circuit Court of Appeals (R. 466, 467).

Likewise, no claim was made that it was admissible under any statute of Massachusetts relating to declarations of deceased persons as now intimated in petitioners' brief (pp. 18-21).

The statement is headed "Investigation in connection with Engine 438 being struck by an automobile while passing over Elkey-Buckley Public Highway Crossing, Mileage 8.42 on State Line Branch, West Stockbridge, Massachusetts" (R. 431). This heading clearly indicates that it was an "investigation" involving the conduct of the engineer himself.

The engineer was riding on the left side of the engine as it was moving with tank forward, and did not see the car approaching from the right side or the collision or know of it until the fireman called it to his attention. His statement was taken two days after the accident in question and answer form and represents a stenographic record of an interview between the engineer and the assistant superintendent of the railroad, at which were present two other employees of the railroad and a Mr. W. E. Christie of the Massachusetts Public Utilities Commission.

At the trial petitioners' counsel, on cross-examination of respondent's witness, Laurence Bona, called for a statement of the witness given to respondent's attorney (R. 107). Upon being advised by the trial judge that under the rule followed by the judges in the district, if he looked at the statement, the opposing side might offer it in evidence, petitioners' counsel declined to inspect the statement (R. 107, 224). The Circuit Court of Appeals refused to reverse on this ruling and error is claimed (R. 474).

The trial court charged that the petitioners had the burden of proving contributory negligence (R. 387). Counsel then requested the court to charge (16th request, R. 403): "In the personal injury action plaintiff has the burden of proving freedom from contributory negligence." To the charge and to the refusal to grant this request petitioners excepted (R. 394). The Circuit Court of Appeals unanimously held that the charge on burden of proof was correct (R. 475, 483) and error is claimed.

III

Questions Presented

(1) Whether the Circuit Court of Appeals properly sustained the trial court's exclusion of the statement of petitioners' deceased engineer offered under 28 U. S. C. A. § 695.

(2) Whether the Circuit Court of Appeals properly held that the denial of petitioners' demand to inspect, without condition attached, a statement made by respondent's witness, constituted reversible error.

(3) Whether the Circuit Court of Appeals properly sustained the trial court's charge that the burden of proof as to contributory negligence was on the petitioners in a diversity of citizenship case under the Conflict of Laws Rule of New York.

IV

Summary of the Argument

POINT I

The statement of petitioners' deceased engineer, Exhibit J for Identification (R. 431-435), was properly excluded.

A. It is inadmissible at common law.

B. It is inadmissible under 28 U. S. C. A. § 695 (Act of June 20, 1936, Chap. 640, Sec. 1, 49 Stat. 1561).

C. The decision is in accord with the authorities.

POINT II

The holding of the Circuit Court of Appeals that the trial court's denial of petitioner's demand to inspect, without conditions attached, a statement made by respondent's witness, did not constitute reversible error.

POINT III

In the personal injury action the petitioners had the burden of proving contributory negligence.

V

ARGUMENT

POINT I

The statement of petitioners' deceased engineer, Exhibit J for Identification (R. 431-435) was properly excluded.

In its opinion, written by Judge Frank and concurred in by Judge Swan, the Circuit Court of Appeals held:

> "The engineer's report would clearly be excluded under the common law rule" (R. 442).
>
> "The statute does not render admissible a hearsay statement made by an employee under standing orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering these reports is to use them in litigation involving those accidents" (R. 465).

In a dissenting opinion Judge Clark states that he is much disturbed by the interpretation of the statute as it seems to be directly opposed to the intent of the statute as shown by its plain terms (R. 476).

A

It is inadmissible at common law

Under no principle of common law is this statement admissible as it is hearsay and a self-serving declaration and does not come within any recognized exception to the hearsay rule. It is not admissible under the shop-book rule, or the extension of that rule relating to entries made in the regular course of business.

Recognizing the necessity for proving entries in books of account, the courts formulated the shop-book rule to assist small traders who kept no clerks to prove their accounts.

With the growth of modern commercial business the courts recognized the need for liberalization of this rule and permitted, under the theory of entries made in the regular course of business, various bookkeeping entries of large business organizations employing a substantial number of clerks, each of whom performed some small routine duty, and no one of whom had personal knowledge of the transaction as a whole.

Northern Pacific Ry. Co. v. *Keyes*, 91 Fed. 47 (C. C., D. N. D., 1898).

Landay v. *United States*, 108 F. (2d) 698 (C. C. A. 6, 1939), cert. den. 309 U. S. 681 (1940).

Rowland v. *St. Louis & S. F. R. R. Co.*, 244 U. S. 106 (1917).

Such entries, however, were surrounded with a guarantee of trustworthiness and were without motive to misrepresent. This principle of trustworthiness and lack of motive to misrepresent is recognized by Wigmore throughout his chapter on "Exceptions to the Hearsay Rule" (Wigmore, 3d Ed., Vol. 5, Sec. 1422; Appendix, p. 40).

This Court recognized this principle and admitted in evidence records of public service corporations where the safe conduct of important public utilities depended on the care and accuracy in which the reports in question were kept and where the method of keeping books was constantly open to supervision and inspection and where "the guaranty of their truth is sufficiently established by the scrutiny to which they are always subject."

Consolidated Gas Co. v. *Newton*, 267 Fed. 231, 242 (D. C. S. D. N. Y., 1920), aff'd 258 U. S. 165 (1922).

Kings County Lighting Co. v. *Nixon*, 268 Fed. 143, 146 (D. C. S. D. N. Y., 1920), aff'd 258 U. S. 180 (1922).

This statement of the engineer is clearly hearsay and a self-serving declaration and does not meet the requirement of trustworthiness and lack of motive to misrepresent. Similar statements, or reports, of conductors and motormen in charge of common carriers have been held to be inadmissible.

Connor v. *Seattle R. & S. Ry. Co.*, 56 Wash. 310, 105 Pac. 634 (1909).

Bloom v. *Union Railroad Co.*, 165 App. Div. 257 (1914).

North Hudson Ry. Co. v. *May*, 46 N. J. L. 401, 5A. 276 (1886).

Rickabaugh v. *Youngstown Municipal Ry. Co.*, 55 Ohio App. 431, 9 N. E. (2d) 999 (1936).

As stated by Judge Frank (R. 443), "This motive factor has been stressed in the decisions," which are referred to specifically in the opinion (R. 444-445). The element of trustworthiness, as a foundation of the "regular course of business" exception, has been consistently followed in the Second Circuit in the cases referred to by Judge Frank (R. 445).

This same principle of circumstantial guarantee of trustworthiness involving the absence of a vigorous motive to misrepresent (as stated by Judge Frank, R. 446) applies to practically all the exceptions to the hearsay rule, such as declarations about private boundaries, statements concerning family history, spontaneous declarations and dying declarations.

Wigmore (3rd Ed., 1940), Section 1566 (Appendix, p. 41), declarations concerning boundaries; Section 1438 (Appendix, p. 41), concerning dying declarations; Section 1747 (Appendix, p. 42), concerning spontaneous declarations; Sections 1482, 1484 (Appendix, p. 41), concerning declarations as to family history.

From this analysis of the common law rule the majority conclude (R. 448):

> "It is clear, then, that the words 'regular course of business,' as used in the decisions, have always included the concept that the circumstances must be such as to safeguard against any crude bias on the part of persons making the records or supplying the information and against any great likelihood that the records may have been fabricated by interested persons for the primary purpose of use in litigation which is in prospect at the time. The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them. But it is beyond question that a requirement in a business that reports should regularly be made which, by their very nature, are highly likely to be biased, did not bring such reports within the meaning of the words of art, 'regular course of business'. That the defendant railroad here had a regulation requiring its employes, when they were the actors in accidents, regularly to make reports of such accidents for use in probable litigations, did not suffice to include such reports within the 'regular course of business', as those words have always been understood by lawyers and judges. For the 'regularity' which justifies the exception is the kind which tends to 'counteract the possible temptation to misstatements', as Wigmore has noted. It follows that the phrase 'regular course of business' never covered a regular practice of making records with the purpose of supplying evidence in a highly probable lawsuit, when those records are made by persons with every 'possible temptation to misstatements'. We have found no case holding or even suggesting that, absent a statute changing the common law rule, such a statement as the engineer's is admissible, loaded as it is with motives to misrepresent the facts."

B

It is inadmissible under 28 U. S. C. A., § 695

This section is identical in language with the so-called Model Act (Appendix, p. 37) drafted by a committee ap-

pointed by the Legal Research Committee of the Commonwealth Fund, which reported its findings and recommendations in a volume entitled "The Law of Evidence; Some Proposals for Its Reform," published in 1927 by Yale University Press.

As stated in Chapter 5, entitled "Proof of Business Transactions to Harmorize With Current Business Practice," page 51, the adjudicated cases "reveal the need of inducing the courts to give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business."

There is nothing in this report that would indicate that the committee in using the words "regular course of business" in the proposed statute had any thought in mind other than the meaning of those words at common law. It is clear, moreover, from this report that the proposed statute contemplated only a simplification in the matter of proving bookkeeping records maintained by mercantile and industrial business (R. 453-455).

This report reviews the history of the shop-book doctrine, and among its findings says (p. 53): "It is too obvious for comment that a rule with such a history, hedged about by so many limitations is absolutely inadequate to meet the demands of litigation involving modern business transactions."

The report then discusses the rule admitting "regular entries in the regular course of business" and points out the insufficiency of this rule for modern business (pp. 53-54), and then reviews the use of these entries to revive or supplement recollection (pp. 54-57). After considering the three propositions involved in the chapter, the report states: "The law, then, if properly presented and understood, furnishes a method by which most business accounts can be proved; by a slight extension all could be proved. But at what an exorbitant cost!" (p. 57). It then sets out "the chain of events in a large business house, showing that scores of persons, many of them unidentifiable, work on

an order from the time it is sold until the customer is billed" (Report, pp. 57-61; R. 454). The report then concludes: "These statements demonstrate how far modern business has departed from the rules which the courts seem to think it should follow; and they make Mr. Wigmore's position on this question well-nigh impregnable" (p. 61, quoting 3 *Wigmore*, Evidence [1923], sec. 1530).

In commenting on the Model Act, Judge Frank says (R. 454):

> "No one knew better than the sponsors of the Model Act—men like Wigmore and Morgan—the traditional significance of 'regular course of business'. *There can be no doubt that their intention was to widen the exception to the hearsay rule relating to such writings. But it is equally without doubt that they did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning.* If that had been their intention, they would surely have said so, either in the language of the Act itself or in their Report, in order to avoid misleading the lawyers in the legislatures asked to enact that statute. There is nothing whatever in the Report of the Commonwealth Committee even faintly intimating any purpose completely to do away with every one of the traditional safeguards against a motive to misstate in statements made in 'the regular course of business'. Nor is there anything in any subsequent comments of any members of that committee showing that they had any such intention." (Italics are Judge Frank's.)

While it is true that when there is no ambiguity there is no room for construction of a statute, it is also true that words must be given the meaning required by usage and interpretation and that the statutes must be construed to carry out the intent of the law-enacting body.

This Court, in *Ozawa* v. *United States*, 260 U. S. 178, 194 (1922), said:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Reports of legislative committees may be consulted as an aid to ascertain the intent of Congress in enacting a statute.

McLean v. *United States*, 226 U. S. 374 (1912).
Church of the Holy Trinity v. *United States*, 143 U. S. 457 (1892).

In order to understand the intent of Congress in adopting Section 695, it is proper and necessary to consider the method of its proposal and any reports or debates thereon. The court in its amended opinion (R. 484-488) considers these questions and shows "the limited objective at which Congress was in fact driving" (R. 484). The report of the Senate Judiciary Committee consists entirely of a letter from the Attorney General to the Chairman of the Committee and a memorandum referred to and enclosed with that letter, which are set forth in the opinion (R. 484-488). Apparently there was no extended debate on the bill, either in the House or Senate. It must be assumed, however, that Congress considered the report of the Attorney General and passed this act upon the basis of the reasoning of his recommendation. From his recommendation it is clear that he proposed the bill in order to make uniform in the federal courts the modern rule followed by many federal and state

courts regarding admissibility of business records, and particularly the rule as it theretofore had been applied in the Second Circuit.

Clearly there is no expressed legislative intent in the words of Section 695 that the common law requisite of trustworthiness was intended to be removed. In determining the legislative intent it was quite proper and even necessary for the court to consider the meaning of the words as reflected from the prior use of the same words at common law, and the history of those words as revealed in the decisions, in the report submitting the act and in the discussion in Congress.

There is no doubt that the report of the Commonwealth Fund Committee was considered when Section 695, was passed, and, also, the decisions in states where the so-called Model Act had been previously adopted. The Attorney General, in recommending the bill, informed Congress of similar statutes in other states, including New York. In his report submitting the bill appears the following (74th Congress, 2d Session—report No. 1965, April 24, 1936):

> "A draft of a bill is submitted herewith designed to make uniform in the Federal Courts the modern rule now followed generally by the Federal Courts, and many state courts, to which reference has been made. This bill follows language recommended by Wigmore in Wigmore on Evidence, 1934 Supplement, Section 1520, and is almost identical with New York and Maryland statutes on the subject."

Judge Frank holds that the words "regular course of business" twice repeated in the statute should be given the settled meaning observed at common law (R. 450), and, after reviewing at length the history and application of Section 695, says (p. 461):

> "With all that in mind, we construe the statute as not making admissible the engineer's statement which, by its very nature, is dripping with motivations to misrepresent. Accordingly, *we decide this and no more:*

> "The statute does not permit the introduction in evidence of a hearsay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the memorandum or report knows at the time of making it that he is very likely, in a probable lawsuit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability."

And again (R. 465):

> "But our decision here raises no such problem. We are not leaving the extent of the disqualifying motive under § 695 at large or entrusting discretion with respect to it to the trial judge; for, as we have said, we decide merely this: The statute does not render admissible a hearsay statement made by an employee under standing orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents."

In 1928, New York adopted verbatim the statute proposed by the Committee of the Commonwealth Fund as Section 374a of the Civil Practice Act (Appendix, p. 37). Prior to the passage in 1936 of Section 695, the appellate courts of New York had construed and interpreted this Section 374a.

In *Needle* v. *New York Railways Corporation*, 227 App. Div. 276 (1929), aff'd 256 N. Y. 616 (1931), a husband and wife sued for personal injuries to the wife due to the alleged negligence of defendant's operation of its trolley car which struck the wife as she was crossing the street. The principal issue was the circumstances under which the accident happened. This was sharply disputed. Plaintiff contended she attempted to cross while the trolley was stopped. De-

fendant claimed the plaintiff crossed in front of the moving car.

Defendant offered in evidence a police blotter containing a report of the accident by a policeman who did not see the accident but based his report upon hearsay statements made to him by third parties, including the motorman of the car, and which contained the statement "Responsibility Pedestrian". Court reversed judgment for defendants. In passing upon the admissibility of the police blotter under Section 374a the court said (p. 278):

> "This section was enacted in order to do away with the archaic rules of procedure in relation to book entries. The section, however, does not cover and should not cover the use to which it was here put in permitting in evidence the report of the police blotter. Primarily the urge for this procedural change was the same as that which first produced and limited 'shop book' rule enunciated in the early New York case of *Vosburgh* v. *Thayer* (12 Johns 461), and which also has produced further extensions of that rule, namely, the reasonable requirements of business men in having admitted in evidence entries of a commercial nature. As enacted this section does not cover commercial entries alone. It is to be noted, however, that in every case where the section applies the fact must be found by the trial judge that the entry 'was made in the regular course of any business * * *.' In the case at bar, to show that this record is inadmissible, it is only necessary to point out that the statements made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but on the contrary, the report of the policeman was made upon the irresponsible gossip of by-standers and the even more unreliable conclusion of the interested motorman who, instead of being so placed as to be presumed to be without a motive to falsify in helping to make the record, had every reason to give a biased and false report. The police blotter, therefore, was erroneously admitted."

In *Johnson* v. *Lutz*, 253 N. Y. 124 (1930), plaintiff sued to recover damages for death of her intestate, who was

killed when his motorcycle collided with defendant's truck at a street intersection. A policeman's report of the accident, filed by him at the station house, containing statements from bystanders, was offered in evidence by the defendant under Section 374a of the Civil Practice Act and was excluded. This exclusion was held proper.

The court refers to *Vosburgh* v. *Thayer*, 12 Johns. 461, decided in 1815, wherein shop books were held to be admissible to prove an account, stating that decision was the basis of law until the passage of 374a.

The court then says (p. 126):

> "Under modern conditions the limitations upon the right to use books of account, memoranda or records made in the regular course of business, often resulted in a denial of justice, and usually in annoyance, expense and waste of time and energy. A rule of evidence that was practical a century ago had become obsolete. The situation was appreciated and attention was called to it by the courts and text writers. (Woods Practice Evidence [2d ed.] 377; 3 Wigmore on Evidence [1923], § 1530.)
>
> "The report of the Legal Research Committee of the Commonwealth Fund, published in 1927, by the Yale University Press, under the title 'The Law of Evidence—Some Proposals for Its reform' dealt with the question in chapter 5 under the heading 'Proof of Business Transactions to Harmonize with Current Business Practice'. That report, based upon extensive research, pointed out the confusion existing in decisions in different jurisdictions. It explained and illustrated the great need of a more practical, workable and uniform rule, adapted to modern business conditions and practices. The chapter is devoted to a discussion of the pressing need of a rule of evidence which would 'give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business.' At the close of the chapter the committee proposed a statute to be enacted in all jurisdictions. In compliance with such proposal the Legislature enacted section 374a of the Civil Practice Act in the very words used by the committee.

> It is apparent that the Legislature enacted section 374a to carry out the purpose announced in the report of the committee. That purpose was to secure the enactment of a statute which would afford a more workable rule of evidence in the proof of business transactions under existing business conditions."

Again, at page 128:

> "An important consideration leading to the amendment was the fact that in the business world credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty."

At page 129:

> "The Legislature has sought by the amendment to make the courts practical. It would be unfortunate not to give the amendment a construction which will enable it to cure the evil complained of and accomplish the purpose for which it was enacted. In construing it we should not, however, permit it to be applied in a case for which it was never intended."

In later cases New York courts have admitted hospital records in evidence as entries made in the regular course of business,

Meiselman v. *Crown Heights Hospital, Inc.*, 285 N. Y. 389, 396 (1941).

People v. *Kohlmeyer*, 284 N. Y. 366, 369 (1940).

Time sheets and books of account were held admissible in *Warner-Quislan Co.* v. *Charat*, 143 Misc. 443 (1932); old letters passing between railroad officers and old resolutions from railroad records, in *Harrison* v. *N. Y. C. Railroad Co.*, 255 App. Div. 183 (1938), and payroll records in *Matter of Booth and Flinn*, 249 App. Div. 893 (1937).

In *People* v. *Robinson*, 273 N. Y. 438, 446 (1937), notations on checks were held inadmissible. In *Rogg* v. *Valentine*, 280 N. Y. 268, 278 (1939), record cards and check

stubs were held inadmissible. In *Poses v. Travelers Insurance Co.*, 245 App. Div. 304, 307 (1935), an affidavit of a family doctor to the medical examiner was held inadmissible, the court saying: "That section was never intended to cover a situation of this type. Furthermore, the section does not make admissible evidence which is otherwise inadmissible." In these cases the entries were held not to be made in the regular course of business.

Petitioners' Cases

Petitioners claim that the decision is contrary to the intent of the statute (Point I, subdivision B, pp. 12-16). They claim that *The Spica*, 289 Fed. 436 (C. C. A. 2, 1923), recognized the necessity in the case of death, insanity or absence from the jurisdiction, for hearsay proof of the activities of a large business. The extent of such admission of proof is thus stated in that case (p. 443):

> "If, then, an entry be offered which is proved as part of a regular system, which is substantially contemporaneous, and concerning which no motive for falsification or probability of negligent error is observed, there exists that reasonable guaranty of trustworthiness which is the second ground of admission of regular entries. Sections 1522-1527. Thus we accept it as a rule, flexible in the reasonable discretion of the court that sees the men concerned in the business and hears evidence as to the necessities of the situation, that no objection, based on the exclusion of hearsay, exists to the admission of an entry made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in like regular course, of a transaction lying in the personal knowledge of the latter, if necessity and trustworthiness as above outlined be shown to exist. Section 1530." (Sections refer to Wigmore.)

In *Chesapeake & Ohio Railway Co.* v. *Stojanowski*, 191 Fed. 720 (C. C. A. 2, 1911), the court held admissible train sheets of a railroad showing the arrival and departure of trains, stating (p. 721):

> "The safe operation of the railroad depended upon the accuracy of the train sheets. Every interest demanded that the entries should be accurate and there was every incentive to employes to make them so. No reason is suggested why the operator who observed the movement of the train at a station and telephoned the information to the dispatcher's office or the dispatcher who received and made the entry should have made an error. The train sheet entries were made in the regular course of the operation of the railway and, in our opinion, came within a recognized exception to the hearsay rule."

In *Massachusetts Bonding and Insurance Co.* v. *Norwich Pharmacal Co.*, 18 F. (2d) 934 (C. C. A. 2, 1927), ordinary bookkeeping records were offered in evidence and the court said (p. 937):

> "Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself and of the self-consistency of the contents."

In *Rowland* v. *St. Louis & S. F. R. R. Co.*, 244 U. S. 106 (1917), the court, in setting aside objections to reports prepared by the railroad in connection with division of expense and income, said (p. 108):

> "* * * But it is enough to say that the Railroad adopted the only practicable mode of presenting its results; that it exhibited its work-sheets and data to the appellants, that the returns were made by the employees in the course of their business and that if the appellants had desired to question any of the data they could have called for further verification. It seems to us that technical rules are satisfied and that justice plainly requires this objection to be set aside."

In *Sullivan* v. *Minneapolis St. Ry. Co.*, 161 Minn. 45 (1924), plaintiff, a passenger, claimed she was injured when defendant's street car made an emergency stop. Defendant had a rule requiring all motormen to make a report of every emergency stop. At the trial his report was of-

fered in evidence to repel an attack upon his credibility on the theory that such consistent statement was made before he had any motive to falsify. It is true that the court thereafter, in dicta, intimates that such report might have been introduced generally to prove the fact. The report, however, contained only statements which the motorman could give at the trial and which he had given. It contained only his acts and no hearsay declarations or conclusions. Nothing in the court's opinion indicates that it would have admitted a statement such as petitioner's Exhibit J from a person with a motive to falsify and containing hearsay and conclusions.

In *Gelbin* v. *N. Y., N. H. & H. R. Co.*, 62 F. (2d) 500 (C. C. A. 2, 1933), a record made by an employee of the state department of public works was offered under Section 374a of the New York Civil Practice Act and was admitted in evidence. The court's ruling, however, seems to be based largely upon its decision in *DiCarlo* v. *United States*, 6 F. (2d) 364, 366, in holding that the record was a prior statement of a witness made before any motive to falsify had arisen and was competent when his veracity as a witness had been challenged.

C

The decision is in accord with the authorities

In addition to the cases heretofore mentioned under A and B it is submitted that all of the decisions dealing with Section 695 have "consistently high-lighted the absence of a powerful motive to misstate as a necessary factor to render admissible memoranda made in the regular course of business" (R. 461).

In *Pressell* v. *New England Transportation Co.*, 91 F. (2d) 1019 (C. C. A. 2, 1937), which arose under the New York statute before Section 695 became operative, the lower court's decision rejecting a police blotter was sustained under the *Lutz* and *Needle* cases, supra (R. 461).

In *Hunter* v. *Derby Foods, Inc.*, 110 F. (2d) 970, 973 (C. C. A. 2, 1940), a certificate made by a coroner in the course of his official duty was held admissible, the court referring not only to Section 695 but to Section 367 of the Civil Practice Act of New York.

In *Ulm* v. *Moore-McCormack Lines, Inc.*, 115 F. (2d) 492 (C. C. A. 2, 1941), rehearing denied 117 F. (2d) 222, cert. den. 313 U. S. 567 (1941), a marine hospital record on a form of the U. S. Public Health Service executed in the regular course of duty by the attending physician was held admissible.

In the *Ulm* case (115 F. [2d] 495), Judge Clark says: "The objective, as Wigmore so lucidly explains, was to do away with the technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers."

In *United States* v. *Mortimer*, 118 F. (2d) 266 (C. C. A. 2, 1941), a tabulation and charts made by a public accountant from public records was held admissible.

In *Reed* v. *Order of United Commercial Transportation of America*, 123 F. (2d) 252 (C. C. A. 2, 1941), a hospital record containing the attending doctor's diagnosis of patient's condition was held admissible.

States besides New York have enacted a statute identical with, or similar to, the language in the Model Act.

In 1935, Michigan adopted it in identical language (No. 15, Public Laws of Michigan, 1935; Appendix, p. 38). In *Gile* v. *Hudnutt*, 279 Mich. 358, 364 (1937), the court was called upon to interpret the act in connection with certain hospital records. Holding that the object of the statute was well stated in *Johnson* v. *Lutz*, 253 N. Y. 124, and quoting extensively therefrom, the court said:

> "The act simply enlarges a rule of evidence and follows the model acts adopted in Maryland, New York and Rhode Island. The act not only provides for books or records kept in commerce, but also in occupations and professions. A full discussion of the act may be found in Vol. 14, Michigan State Bar Journal, 35."

In *Sadjak* v. *Parker-Wolverine Co.*, 281 Mich. 84, 87 (1937), the court said:

> "It is claimed that, as this statement is part of the hospital record, it was admissible under Act No. 15 of the Public Acts of 1935. We discussed the act in *Gile* v. *Hudnutt*, 279 Mich. 358, 272 N. W. 706, where we stated that the act contained its own limitations. What decedent told the hospital authorities did not refer to any act, transaction, occurrence, or event in the hospital treatment. The portion of the record thus objected to was pure hearsay and of no evidentiary force and inadmissible."

In *Valenti* v. *Mayer*, 301 Mich. 551, 557 (1942), the court said:

> "However, the Gile case and Sadjak v. Parker-Wolverine Co., 281 Mich. 84, at page 87, 274 N. W. 719, both hold that the act has its limitations and that the only admissible record is that which refers to acts, transactions, occurrences or events incident to the hospital treatment. Parts which do not are hearsay and not admissible. Therefore, in admitting the hospital record, the trial court should have admitted only those parts having to do with matters within the limitations of the statute. It was error to admit parts of the hospital record which contained only information given by various people as to history of the plaintiff prior to the accident."

The statute of Rhode Island is substantially similar to the Model Act (R. I. General Laws Annotated [1938], Ch. 538, Sec. 1; Appendix, p. 39).

In *Preston* v. *United Electric Rys. Co.*, 61 R. I. 378, 387 (1938), the court said:

> "The eighth exception concerns evidence in the form of a written report, offered by the defendant as coming within the provisions of Public Laws 1928, chapter 1161. Assuming, without deciding, that the report in question was admissible under the terms of said statute, we find that its exclusion was harmless error. The

fact, to help establish which the report was being offered by the defendant, was already in evidence in the case, and was before the jury for their consideration."

Pennsylvania has a Uniform Business Records as Evidence Act (Purdon, Supp. 1942, Tit. 28, Secs. 91a-d; Appendix, p. 39).

In *Freedman* v. *Mutual Life Insurance Company of New York*, 342 Pa. 404, 412 (1941), the court said, relative to the admission of hospital records:

"The limitations on this exception to the hearsay rule are set forth in Paxos v. Jarka Corporation, 314 Pa. 148, 153, 171 A. 468, where we held that such records must satisfy three probative requirements: (1) they must be made contemporaneously with the acts to which they purport to relate; (2) there must have been present at the time no contemplative motive for falsification; (3) they must have been made by a person having knowledge of the facts set forth, or one competent to predicate a medical and scientific opinion on the facts."

And again, at page 414:

"If any doubt exists upon this point it is resolved by the Uniform Business Records as Evidence Act, Section 1, which expressly applies to the records of 'every kind of business, *profession*, occupation, calling, or operation of institutions, whether carried on for profit or not.' (Italics added.) Section 2 provides: 'A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission'. The legislature certainly intended thereby an extension of the old 'shop-book' rule, and to make professional records competent documentary evidence un-

> der the circumstances set forth. We agree with plaintiff that the Act did not intend to make relevant that which is not relevant, nor to make all business and professional records competent evidence regardless of by whom, in what manner, and for what purpose they were compiled, or offered. We do think, however, that the Act makes competent the records of these physicians as documentary evidence of the matters we have indicated, and that it applies as well to the records of prescriptions prepared by the pharmacist, and to the cardiogram prepared by Dr. Ohlson."

The engineer's statement contains expressions of opinion and conclusions which would have been inadmissible if the engineer was orally examined in court. Although he did not see the accident, he expresses his opinion and conclusion that the automobile struck the train and gives his opinion as to visibility without showing that the conditions and circumstances were practically identical, and expresses his conclusion that he would put the brakes on in any event (R. 434). The document was offered in its entirety. The engineer's statement as to blowing the whistle, ringing the bell and having the headlight on had been testified to by eleven witnesses for the defense, including the train crew and residents of the community (R. 234, 236, 262, 267, 275, 295, 296, 320, 348, 357, 360, 364, 368, 379).

From an analysis of the statute and an examination of its origin and history, and under the decisions heretofore interpreting Section 695, it is respectfully submitted that the exclusion of the statement was proper.

POINT II

The holding of the Circuit Court of Appeals that the trial court's denial of petitioners' demand to inspect without conditions attached, a statement made by respondent's witness, did not constitute reversible error.

When defendants' counsel, on cross-examination of plaintiff's witness, Laurence Bona, demanded the production of the statement given by the witness to plaintiff's attorney, the court advised him of the rule in the district that such production and inspection would permit the plaintiff to offer the statement in evidence (R. 107), and later stated: "That is the rule followed by the judges in this district" (R. 234).

This rule was enunciated in 1891 by Judge Lacombe in *Edison Electric Light Co.* v. *United States Electric Lighting Co.*, 45 Fed. 55 (C. C. S. D. N. Y.), and followed in *McCarthy* v. *Palmer*, 29 Fed. Supp. 585 (E. D. N. Y.), affirmed on other grounds in 113 F. (2d) 721 (C. C. A. 2, 1940).

The Circuit Court of Appeals disapproves of this rule in the following language (R. 473):

> "At any rate, the old 'fixed principle' of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic as the buttons on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules, we reject it."

The majority, however, refused to reverse for the reasons given as follows (R. 473):

> "Nevertheless, we do not reverse here for error in the trial judge's ruling, for these reasons: (1)

the written statement of the witness could, at most, have been used for purposes of impeachment. As that statement is not in the record before us, it is impossible for us to know whether it contained any remarks contradicting the witness' testimony at the trial so that it would have served for impeaching purposes. If counsel wanted to assign error, he should have asked the trial judge to certify that statement to us, as part of the record on appeal. Since the statement is not before us, the result, if we were to reverse, would be to send the case back on the mere chance that the statement may contain matter which would have led to such an impeachment of the witness as materially to affect the jury's verdict. A verdict should not be so lightly disturbed. (2) Moreover, we cannot say that the trial judge or appellants' counsel was unreasonable in relying on Judge Lacombe's decision in the *Edison Electric* case. (Certainly appellants' counsel was not surprised, since it happens that he had, on behalf of the same clients he represents here, successfully persuaded the judge to render the decision in *McCarthy* v. *Palmer, supra*). In the circumstances, it would be unwise to overturn a verdict because of the erroneous ruling on this point."

Rule 26(b) is entitled "Depositions Pending Actions". Rule 34 is entitled "Discovery and Production of Documents and Things for Inspection, Copying or Photographing". Both of these rules seem to indicate that they apply to procedure preliminary to trial, and not to situations which develop during the course of cross-examination of a witness at the trial.

The old rule, applicable in the Eastern District, has now been rejected (R. 473). As the document was not marked by counsel for identification, there is nothing to show that the Court's ruling was prejudicial to the petitioners or warranted a reversal.

POINT III

In the personal injury action the petitioners had the burden of proving contributory negligence.

The Trial Court charged that the petitioners had the burden of proving contributory negligence (R. 387) and petitioners excepted (R. 394). They then requested the Court to charge (16th request, R. 403):

> "In the personal injury action, plaintiff has the burden of proving freedom from contributory negligence."

To the refusal to charge this request they excepted (R. 395). The Circuit Court of Appeals unanimously sustained the rulings of the Trial Court in holding that the burden of proving contributory negligence was on the petitioners (R. 475, 483) under the Conflict of Law Rule of New York.

a. Petitioners' request No. 16 was too broad in scope and, therefore, was properly denied.

As to the causes of action for personal injury, the petitioners, in the first place, are not in a position to urge the exception to the refusal to charge this request. The request was a general request covering the personal injury action and applied to both the first cause of action predicated upon Chapter 160, Section 138 (Appendix, p. 35), of the Massachusetts Laws, the bell and whistle law, and to the second, based upon the common law. In their request No. 5 (R. 401), the petitioners asked the Court to charge that under the counts based upon common law, ordinary negligence would defeat the respondent and that in counts based upon Chapter 160, Sections 232 and 138 (Appendix, p. 35), gross or wilful negligence or violation of law would defeat the respondent. The Court in effect charged as requested (R. 388, 395), to which no exception was taken (R. 395). Having invoked this ruling by request No. 5 (R. 401), thereby

consenting to the applicability of Section 232 (Appendix p. 35), as to the first cause of action, counsel cannot now complain of the denial of his 16th request, which obviously is so broad in scope that it includes the personal injury action as set forth in both the first and second causes of action.

b. Under the New York conflict of law rule, the charge was proper.

It is fundamental that in transitory tort actions the rights of the parties are governed by the law of the state where it arose. Since this tort occurred in Massachusetts, the law of that state is generally controlling. This Court has held that in considering the laws of different states in diversity of citizenship cases, the decision of the "highest state court is the final authority on state law", where it has expounded the law.

Fidelity Trust Co. v. *Field*, 311 U. S. 169, 177 (1940).

In following this rule, the Circuit Court of Appeals held (R. 475):

> "If we were to reject the Rule (Rule 8c) we would then turn to the decisions of the New York Courts including those relating to conflict of laws. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487. While with respect to intra-mural transactions, New York courts hold that the burden of proof is on the plaintiff, in a case such as this, they would apply, as a matter of conflict of laws, the Massachusetts law. *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127."

The petitioners assert that the determinations of the courts of New York in this respect are here controlling (brief p. 25). If that be so, the courts of New York have answered, holding that in circumstances such as these, statutes dealing with contributory negligence are of substance.

In *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127 (1929), the plaintiff, injured in Ontario, Canada, recovered in New York under Ontario laws and ordinances. Ontario has a comparative negligence statute. The trial judge under that statute charged that the burden of proving contributory negligence was on the defendant. The Court of Appeals said (p. 134):

"While it is true that in this state we speak of the proof of freedom from contributory negligence as being a burden of proof resting upon the plaintiff, it is, in reality, even here, more than a mere burden of proof, it is a substantive part of the plaintiff's right to recover. At common law a person has no cause of action for negligence, if he himself has contributed, in the slightest degree, to bring it about. A defendant's negligence is not sufficient to justify a recovery. * * * But whether the plaintiff has the burden in the first instance of proving freedom from contributory negligence, or the defendant the burden of proving contributory negligence, the substantive right to a recovery remains the same; the slightest contributory negligence upon the part of the plaintiff, no matter how or by whom it may be proven, bars recovery, establishes that there is and was no cause of action, no right to damages.

The Contributory Negligence Act of Ontario does more than touch or affect a matter of procedure; it goes beyond directing who shall first proceed to prove that the act of the defendant was solely responsible for the act or the damage. The act gives a right to recover not recognized by the common law. It provides that, even if the plaintiff be guilty of contributory negligence, he may yet recover, if the defendant were more negligent; the recovery, however, being limited to the surplus degree of negligence, as figured out by a jury. The law of the state of New York has no application under such circumstances; it is impossible of application. As a mere matter of procedure, the plaintiff here must prove his freedom from contributory negligence, but, if in his proof he fails to establish his freedom from contributing neglect or shows that he was neglectful, his complaint must be dismissed. He has no cause of action. * * * As we

have said, the Ontario act goes beyond a matter of procedure and gives a right unknown to the common law, the right of an injured person to recover for another's negligence, even though contributing by his own neglect to bring it about. For these reasons the trial court was quite correct in charging the jury in accordance with the Ontario statute.

The appellant suggests that, as this act does not refer to the burden of proof, the plaintiff, under our form of procedure, should have the burden of proving either freedom from contributing negligence or else the degree to which his own negligence contributed. We have no such law in this state. To follow the appellant's suggestion would still require our courts to adopt a portion of the Ontario statute. If we are to adopt a part we must apply it as a whole, because it affects the substantial rights of the parties. Under our rule, it would be impossible for the plaintiff to prove his own contributing neglect, without proving himself out of court, as we have no comparative negligence rule for actions at common law. As has been stated more than once, this action is under the Ontario statute.

Furthermore, the courts of this State are not unaccustomed to the application of the law of contributing negligence adopted by the Ontario act. We have a similar provision under section 3 of the Federal Employers' Liability Act (Act of April 22, 1908, 35 Stat. at Large 66, ch. 149). Although the acts of Congress form part of the laws of the State of New York (*Central Vermont Ry. Co.* v. *White*, 238 U. S. 507), unlike the laws of Ontario, yet the application, when it is to be made, is very much similar in both instances. The burden of proof has also been shifted in death cases. (Decedent Estate Law [Cons. Laws ch. 131, § 131.) Under the Workmen's Compensation Law (Laws of 1922, ch. 615, § 11; Cons. Laws, ch. 67) if an employer fails to insure his employees, the employee may maintain an action in the courts for damages on account of an injury received. Not only shall it be unnecessary to plead or prove freedom from contributory negligence, but even the defense of contributory negligence, may not be pleaded. (See, also *Danielsen* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 439; as to the

rule under the maritime law and our previous State Labor Law.) *Jacobus* v. *Colgate* (217 N. Y. 235) may be consulted for an explanation of the difference between rights and remedies, the former pertaining to the law of the place of occasion and the latter to the law of the forum. (See, also, *Duggan* v. *Bay State Street Ry. Co.*, 230 Mass. 370.) The acts giving a right of recovery for negligence causing death generally contain a time limitation. These short Statutes of Limitations of foreign jurisdictions have been applied by our courts as constituting a condition or part of the right or cause of action (*Johnson* v. *Phoenix Bridge Co.*, 197 N. Y. 316)."

The defendants pleaded in their answer Chapter 160, Section 232, imposing liability for violation of Section 138, unless plaintiff is guilty of gross or wilful negligence, or unlawful act (R. 23).

Under Chapter 160, Section 232, it is clear that a person injured by a railroad at its crossing may recover unless it is shown that in addition to a mere want of ordinary care he was guilty of gross or wilful negligence or was acting in violation of law. This statute varies the ordinary common law liability under which a recovery is allowable only if the plaintiff is free from ordinary negligence and requires that the plaintiff in order to be barred from recovery must be guilty of gross or wilful negligence or a violation of the statute.

This statute is in effect similar to the Ontario statute construed in the *Fitzpatrick* case, and a New York court would hold that it must enforce it in its entirety, as it enforced the Ontario statute, irrespective of any decisions in the Massachusetts courts that the question of burden of proof under Section 85 of Chapter 231 is a matter of procedure. If this action were in the Massachusetts court, the plaintiff could recover on his first cause of action under the statute even though he were guilty of want of ordinary care. If the action were brought in the state courts of New York and the New York rule of burden of proof were

applied, plaintiff's failure to show exercise of ordinary care would result in a dismissal, a situation considered in the *Fitzpatrick* case. It is therefore obvious, as pointed out in that case, that the law of the State of New York would have no application under such circumstances, and the court would be bound to apply the Massachusetts statutes in their entirety.

The holding of the Circuit Court of Appeals is not in conflict with *Sampson* v. *Channell*, 110 F. (2d) 754 (C. C. A. 1, 1940), cert. denied 310 U. S. 650, nor with *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. (2d) 253 (C. C. A. 8, 1941). In the *Sampson* case the court applied the conflict of laws rule of Massachusetts. In the *Fort Dodge Hotel Co.* case, where the question of diversity of citizenship was not involved, the court applied the law of Iowa, where the accident occurred and where the action was tried. The same principle of conflict of law was followed in *Boyle* v. *Ward*, 125 F. (2d) 672 (C. C. A. 3, 1942).

In the *Sampson* case, the court, after reviewing the principle of conflict of laws in sister states, said (p. 760):

> "There is no doubt that in this situation the state courts of New York would have applied the same rule of conflict of laws, and would have looked to the lex loci delicti. Fitzpatrick v. International Ry. Co., 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801."

The holdings in *Geoghegan* v. *The Atlas Steamship Co.*, 3 Misc. 224 (1893), aff'd 146 N. Y. 369 (1895); *Wright* v. *Palmison*, 237 App. Div. 22 (2nd Dep't, 1932), and *Clark* v. *Harnischfeger*, 238 App. Div. 493 (2nd Dep't, 1933), in no way relate to or affect the decision in the *Fitzpatrick* case. Nor is *Jarrett* v. *Wabash Ry. Co.*, 57 F. (2d) 669, 671, cert. denied 287 U. S. 627 (1932), in conflict therewith.

c. Under Rule 8c, the charge was correct.

The federal rules were adopted after very careful consideration. The affirmative defenses set out in Rule 8c were apparently intended to include, and probably did include, everything which could and should in federal practice be set up as an affirmative defense.

Whether contributory negligence is a matter of procedure or of substance, is immaterial to the facts and the applicable Conflict of Law Rule in this case. It has been held, however, in this court that contributory negligence is a matter of substance, *Central Vt. Ry. Co.* v. *White*, 238 U. S. 507 (1915), which case was cited with approval in *Cities Service Oil Co.* v. *Dunlop*, 308 U. S. 208, 212 (1939). Burden of proof of contributory negligence in the federal courts has constantly been held to be upon the defendant. *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98 (1934).

In view of this situation, it was not strange, therefore, that the draftsmen of these rules of procedure, recognizing this traditional view of the federal courts, included contributory negligence as an affirmative defense. The Circuit Court of Appeals for the Second Circuit, in *LaGuerra* v. *Brasileiro*, 124 F. (2d) 553, 555 (1942), Clark, J., writing, said:

> "It may be added, further, that defendant pleaded the plaintiff's negligence, upon which it relied; and if we apply the traditional rule of burden of proof envisaged by federal rule 8(c), 28 U. S. C. A., following section 723(c), which is also the rule of admiralty, The Anna O'Boyle, 2 Cir., Dec. 11, 1941, 124 F. 2d 180,—it seems quite clear that upon the record at the close of plaintiff's case this burden was in no way satisfied."

See also "The Tompkins Case and The Federal Rules" by Judge Clark, 1 F. R. D. 417.

Under both the New York rule on conflict of laws and Rule 8(c), the burden of proving contributory negligence was on the petitioners.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

WILLIAM PAUL ALLEN,
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BENJAMIN DIAMOND,
of Counsel.

APPENDIX

Additional Statutes Involved

GENERAL LAWS OF MASSACHUSETTS

Chapter 160, Section 138 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

> "Every railroad corporation shall cause a bell of at least 35 lbs. in weight, and a steam whistle to be placed on each locomotive engine passing upon its railroad; and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least 80 rods from the place where the railroad crosses upon the same level with any public way or travelled place over which a signboard is required to be maintained as provided in sections 140 and 141; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or traveled place. This section shall not affect the authority conferred upon the department by the following section."

Chapter 160, Section 232 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

> "If a person is injured in his person or property by collision with the engines or cars of rail-borne motor cars of a railroad corporation at a crossing such as is described in section one hundred and thirty-eight, and it appears that the corporation neglected to give the signals required by said section or to give signals by such means or in such manner as may be prescribed by orders of the department, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in section three of chapter two hundred and twenty-nine, or, if the life of a person so injured is lost, to damages recoverable in tort, as provided in said section three, unless it is

shown that in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

Chapter 229, Section 3 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator and distributed as provided in section one; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased and distributed as provided in section one."

Chapter 231, Section 85 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing

the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."

Chapter 90, Section 15 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"Every person operating a motor vehicle, upon approaching a railroad crossing at grade, shall reduce the speed of the vehicle to a reasonable and proper rate, and shall proceed cautiously over the crossing. Whoever violates any provision of this section shall be punished by a fine of not less than ten nor more than fifty dollars."

SECTION 374-A:—CIVIL PRACTICE ACT OF NEW YORK:

"§ *374-a. Admissibility of certain written records.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind. [Added by L. 1928, ch. 532, in effect Sept. 1.]"

MODEL ACT PROPOSED BY COMMITTEE OF COMMONWEALTH FUND:

"Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act,

transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." (The Law of Evidence, 1927, Yale University Press, p. 63.)

PUBLIC LAWS OF MICHIGAN—1935—No. 15:

"14207. Books of account and memorandum as evidence; surrounding circumstances; photostatic reproductions.

Sec. 53. Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence or event shall be admissible in evidence in all trials, hearings and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, in proof of said act, transaction, occurrence or event if it was made in the regular course of any business and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but not its admissibility. The term 'business' shall include business, profession, occupation and calling of every kind. The lack of an entry regarding any act, transaction, occurrence or event in any writing or record so proved may be received as evidence that no such act, transaction, occurrence or event did, in fact, take place. Any photostatic or photographic reproduction of any such writing or record shall be admissible in evidence in any such trial, hearing or proceeding by order of the court, made within its discretion upon motion with notice of not less than four days.

All circumstances of the making of such photostatic or photographic reproduction may be shown upon such trial, hearing or proceeding to affect the weight but not the admissibility of such evidence."

PUBLIC LAWS OF RHODE ISLAND, 1927-28, PAGE 528

Chapter 1161, Section 49:

"In any civil proceeding any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. The trial judge, in his discretion, before admitting such writing or record in evidence, may, to such extent as he deems practicable or desirable, but to no greater extent than the law required prior to the passage of this act, require the party offering said writing or record offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the writing or record offered or the original or any other writing or record from which the writing or record offered or the facts therein stated were transcribed or taken, or who has personal knowledge of the facts stated in the writing or record offered. And when such evidence shall be admitted, all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight. The term business shall include business, profession, occupation and calling of every kind."

PURDON'S PENNSYLVANIA STATUTES ANNOTATED

Title 28, Section 91b:

"*Business records.*

A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or

other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. 1939, May 4, P. L. 42, No. 35, § 2."

WIGMORE ON EVIDENCE (3RD ED., 1940)

Section 1422, page 204, Volume V:

"*Second Principle: Circumstantial Probability of Trustworthiness.* The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation."

Section 1527, page 375, Volume V:

"*No Motive to Misrepresent.* It is often added that there must have been no *motive to misrepresent*. This does not mean that the offeror must show an absence of all such motives; but merely that if the existence of a fairly positive counter-motive to misrepresent is made to appear in a particular instance the entry would be excluded. This limitation is a fair one, provided it be not interpreted with over-strictness. The exclusion of the notorious Fleet registers of marriage (*post*, § 1642) illustrates the kind of circumstances that call for the application of this requirement."

Section 1566, page 424, Volume V:

"*No Interest to Misrepresent; Owner's Statement excluded.* The general principle of a circumstantial probability of trustworthiness (*ante*, § 1422) is seen in the requirement that the declarant shall have had no interest or no motive to misrepresent; the words 'interest' and 'motive' being here used by the Courts interchangeably. The general notion is that he must stand in such a position that the Court cannot see any reason to expect misrepresentation."

Section 1438, page 230, Volume V:

"*In general; Solemnity of the Situation.* All Courts have agreed, with more or less difference of language, that the *approach of death* produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to mis-state. The great dramatist expressed the common feeling long before it was sanctioned by judicial opinion. In the following passages will be found the now classical sentences of the earlier English judges, as well as later ones pointing out clearly how the situation supplies a circumstantial probability of accuracy equivalent to that of the tests of oath and cross-examination."

Section 1482, page 297, Volume V:

"*General Principle.* The circumstantial indication of trustworthiness (*ante*, § 1422) has been found in the probability that the 'natural effusions' (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life."

Section 1484, page 301, Volume V:

"*No Interest or Motive to Deceive.* The existence of a controversy is only one circumstance (though the most common one) likely to produce a bias fatal to the trustworthiness of the declaration. Judicial opinion seems to hold, and properly, that other considerations

may under certain circumstances operate to exclude the declarations. In general, they would be excluded where there is any specific and adequate reason to suppose the existence of a motive inconsistent with a fair degree of sincerity. In Lord Eldon's words, they must appear to be the 'natural effusions of a party standing in an even position'."

Section 1747, page 135, Volume VI:

"(1) *General Principle of the Exception.* This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."